Supreme Court, U.S.
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No. 06 -

In The

SUPREME COURT OF THE UNITED STATES

Benjamin Obianwu, (Agency No. 29-722-599)
Petitioner,

vs.

Alberto Gonzales, US Attorney General
Respondent.

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

By: Sandra Greene, Esquire
2001 East Market Street, 2nd Floor
York, Pennsylvania 17402
(717) 755-8188
Attorney For Petitioner
Benjamin Obianwu

QUESTION PRESENTED

The Petitioner is Benjamin Obianwu, a native and citizen of Nigeria and an individual who requested relief in removal proceedings in the form of adjustment of status to that of a lawful permanent resident, pursuant to Immigration And Nationality Act, section 245, and voluntary departure. In a decision entered on July 29, 1999, the Board granted Petitioner's motion to reopen removal proceedings that were terminated on July 10, 1992 in absentia. On May 19, 2003, the Board remanded proceedings to the immigration court following the decision of the immigration judge denying the Petitioner's application for adjustment of status, dated, March 14, 2001. In that decision, the Board made several legal and factual findings , and directed that the immigration judge render a new decision in light of the findings of the Board in the Petitioner's appeal. Upon remand, the immigration judge again denied the Petitioner's appeal on November 25, 2003, largely ignoring the directives of the Board in its remand order. Petitioner appealed again to the Board. On adjudication of the appeal, the Board affirmed the findings of the immigration judge, without opinion.

The Petitioner filed a petition for review with the US Court Of Appeals for the Second Circuit, which, on September 11, 2006, granted the government's motion for summary affirmance , finding that the Board made no legal error and did not abuse its discretion. The Petitioner is now subject to removal to Nigeria and has been informed that his removal will be effectuated

before the end of December 2006.

The question presented is:

Whether an appeal brought under the ***Real ID Act*** may be disposed of by Courts of Appeal, by summary affirmance, where the record reflects that the Respondent has entered separate, contradictory and conflicting decisions regarding issues relevant to the Petitioner's appeal and whether such adjudication violates the Petitioner's right to a fundamentally fair administrative proceeding and protects his right to due process of law in those proceedings?

PARTIES TO THE PROCEEDINGS

Petitioner is Benjamin Obianwu. Petitioner's name has been mis-spelled at various times in the administrative proceedings as Benjamin Bianwu. Respondent is Alberto Gonzales, the Attorney General of the United States.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Benjamin Obianwu, respectfully petitions for a writ of certiorari to review the decision below judgment of the United States Court Of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals below is unreported.

JURISDICTION

The judgment of the court of appeal on the original appeal was entered on September 11, 2006. The jurisdiction of this court is invoked pursuant to 28 USC sections 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the ***Real ID Act***, are found at Pub.L. No. 109-13, Div. B, 119 Stat. 231 (2005). Not reprinted, but wholly applicable is the due process clause of the United States Constitution.

STATEMENT OF THE CASE

1. Statutory Background-

This case presents a question as to the proper

application of the provisions of the ***Real ID Act*** permitting challenges to orders of deportation, through the filing of a petition for review, where the Petitioner presents constitutional challenges to the propriety of the deportation order.

The Respondent challenged the jurisdiction of the Court of Appeals to consider the Petitioner's appeal, and sought summary affirmance, asserting that the Board applied, correctly, the applicable legal principles and its decision involved no abuse of discretion. The Court Of Appeals granted the Respondent's motion, but failed to consider or review the due process violations committed by the Board in its affirmance without opinion of the November 25, 2003 decision of the immigration judge. Under the ***Real ID Act***, the Court Of Appeals was obligated to adjudicate the Petitioner's appeal based on the constitutional errors that existed, irrespective of the Board's ultimate discretion to grant adjustment of status to the Petitioner. The decision of the Court Of Appeals fails to reference any consideration of the Board's constitutional errors in adjudicating the Petitioner's appeal.

The plain language of the ***Real ID Act*** contradicted the Respondent's request for summary affirmance, and, thus rendered the findings of the Court of Appeals error. In pertinent part, the ***Real ID Act*** states: " Nothing in subparagraph (B) or (C), or in any other provision of this Act...which limits or eliminates judicial

review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review with an appropriate court of appeals in accordance with this section." ***Real ID Act***, Section 106(a)(1)(B).

The Petitioner asserts that the Court of Appeals erred in asserting that the appeal warranted summary affirmance issues of discretion were not the only issues to be decided in the Petitioner's appeal. The Board affirmed, without decision, the findings of the immigration judge though the immigration judge failed to conform his findings in the remanded proceedings to the legal determinations of the Board in its 2003 decision remanding the deportation proceedings to the immigration judge. In the 2003 decision, the Board determined that the immigration judge had not properly balanced the Petitioner's positive and negative equities when evaluating whether the Petitioner warranted the favorable exercise of discretion on his adjustment application.

Specifically, the immigration judge made credibility determinations that the Board found to be flawed, placed an improper emphasis on the Petitioner's arrest history in the United States and misconstrued the nature of the Petitioner's conviction for disorderly conduct. The Board found the Petitioner's residence in the United States for 18 years to have been a favorable equity, irrespective of the fact that the Petitioner was out of status during most of his residence in the United States. The Board remanded the proceedings for "... a proper

balancing of factors." (App. D at A-7)

Upon remand, the immigration judge ignored the findings of the Board regarding the Petitioner's equities in view of his negative factors. Upon appeal of the denial of adjustment application to the Board, the Board failed to hold the immigration judge accountable for his failure to conform his findings on remand to the findings of the Board in its 2003 decision. The Petitioner's remanded proceedings were fundamentally unfair as he was not afforded the proper consideration of his positive and negative factors when his adjustment application was adjudicated. This matter was not one of discretion as the Board specified to the immigration judge what the parameters of a proper review were then permitted the immigration judge to ignore those parameters and ignored them itself when the Petitioner appealed the denial of his adjustment application by the Board.

Accordingly, the Court of Appeals was presented with due process issues in the Petitioner's petition for review and its summary affirmance of the Board's decision without consideration of the constitutional issues, which it was permitted to consider pursuant to the ***Real ID Act***, was plain error.

2. Proceedings Below

Petitioner, Benjamin Obianwu, by and through Counsel, Sandra Greene, Esquire, hereby petitions for

a writ of certiorari following the dismissal of his original appeal as presented to the US Court Of Appeals for the Second Circuit, upon the determination of that court that the appeal was subject to summary affirmance of the decision of the Board Of Immigration Appeals.

The Petitioner entered the United States on or about August 8, 1984 as a non-immigrant student, intending to attend El Reno Junior College in El Reno, Oklahoma. The Petitioner ended his studies without obtaining a degree in 1986, but remained in the United States out of status. The Respondent placed the Petitioner into deportation proceedings on or about October 22, 1990, upon issuance of an order to show cause, for his failure to maintain his non-immigrant status, *INA section 241(a)(9)*. Though the Petitioner attended at least one initial deportation proceeding before the immigration court, the government asserted that he failed to appear for a subsequent hearing and an in absentia order of deportation was entered against him on or about February 26, 1992.

The Petitioner appealed the in absentia finding through submission of a motion to reopen with the immigration judge on or about March 4, 1992, as well an appeal with Board on or about that same date. The Board, on or about July 29, 1999 granted the Petitioner's motion to reopen and remanded the proceedings to the immigration court. The immigration judge, however, rejected the motion to reopen finding that jurisdiction had vested with the Board.

On remand, the Petitioner sought relief from removal in the form of adjustment of status and voluntary removal in lieu of other avenues of relief he sought previously. The Petitioner had married a United States citizen on or about October 3, 1999. The government had asserted that the Petitioner had a criminal history in the United States, but was unable to submit evidence to substantiate is assertions. The Petitioner's removal was not sought on the basis of any alleged criminal activity. The Petitioner submitted testimony and evidence in support of his application for relief.

On or about March 14, 2001, the immigration court denied the Petitioner's applications for relief in the exercise of discretion and ordered the Petitioner's deportation to Nigeria. The Petitioner filed an appeal with the Board on or about April 5, 2001. The Board granted the Petitioner's appeal finding numerous errors in the determination of the immigration judge in balancing the Petitioner's positive equities in the United States versus his negative factors. The Board rejected the immigration judge's adverse credibility determination based on the Petitioner's alleged failure to reveal his criminal/arrest history in the United States in court and in his relief application. The Board found the Petitioner's criminal history to be "relatively minor". The Board noted that the Petitioner had been convicted in 1989 for a seat belt violation and in 1999 for disorderly conduct.

Moreover, the Board noted that the agency failed to present evidence of the criminal history, despite being given additional time to secure the documents and

did not seek the Petitioner's deportation on the basis of any criminal offense. Similarly, the Board determined that though it was true that the Petitioner married his wife after already having been placed into deportation proceedings, the fact that she was then pregnant with the Petitioner's child was a strong indication that the marriage was bona fide. Additionally, the Board noted the Petitioner's other family ties to the United States, including his US citizen mother and brother, his lawful permanent resident father, all of whom resided in the United States. The matter was remanded to the immigration judge for a "proper" consideration of the Petitioner's eligibility for relief.

Upon remand, the immigration judge again rejected the Petitioner's application for relief, finding that Petitioner's negative factors outweighed his positive equities. The immigration judge considered as evidence of the Petitioner's lack of credibility the same factors the Board had determined were not evidence of untruthfulness, namely the Petitioner's assertions regarding his criminal/arrest history in the United States as listed on the Petitioner's adjustment application and his in court testimony. The immigration judge failed to consider the Petitioner's length of residence in the United States as a positive equity because the Petitioner was out of status during most of the time that he was present in the United States. He made that finding even though the Board determined that irrespective of Petitioner's out of status condition, his years of residence in the US was a positive factor.

More importantly, however, the immigration judge failed to acknowledge the hardship the Petitioner's removal would have on his US citizen children. Though the immigration judge acknowledged that the Petitioner had a US citizen step daughter whom he supported, and noted that the Petitioner's wife should seek support from that child's father, he said nothing about the hardship to Petitioner's US citizen son. Further, the immigration judge acknowledged the Petitioner's family in the United States and noted some financial hardships to Petitioner's wife, he provided no analysis as to how Petitioner's deportation would affect the emotional/ psychological stability of the family.

Further, though the Board determined that the Petitioner's criminal conduct and arrest history were relatively minor and noted that the Petitioner only paid a fine on account of the disorderly conduct conviction, the immigration judge ignored that determination and found that "...the nature of the charges in his arrest record, raises (sic) serious questions about the suitability of discretionary relief for his applications...The court does accord significant weight, however, to Respondent's 1999 guilty plea for disorderly conduct. " (Decision of immigration judge 11/25/03 at pages 13-14)

Additionally, the immigration judge found "material misrepresentations" on the Petitioner's application for adjustment of status, form I-485 based on Petitioner's assertions regarding his arrest/criminal history in the United States. The Board had already determined that these errors were not probative of the Petitioner's

entitlement to relief, but the Board's findings were ignored by the immigration judge.

On consideration of the Petitioner's appeal, the Board, in its September 6, 2005 decision determined that the results of the immigration judge's determinations were correct, notwithstanding its prior dictate to the immigration judge as to how the remanded proceedings were to conducted. The Petitioner filed a motion to reconsider with the Board which was denied on or about December 20, 2005.

The Petitioner filed a petition for review with the US Court Of Appeals for the Second Circuit and subsequent to its filing, the government sought summary affirmance. On or about September 11, 2006, the Court Of Appeals granted the government's motion finding that the decision of the Board was based on the proper application of the relevant legal provisions and there was no showing of an abuse of discretion. The decision rendered by the Court Of Appeals made no reference to the fundamental fairness afforded the Petitioner in the adjudication of his appeal by the Board or whether the Board's handing of the appeal violated his right to due process of law.

Reasons For Granting the Petition

The decision of the US Court Of Appeals to dismiss the Petitioner's appeal through summary affirmance,

notwithstanding its jurisdiction to consider constitutional and legal issues on appeals presented through petition for review, pursuant to the ***Real ID Act*** , adds to the lack of certainty regarding the implementation of the ***Real ID Act***. The decision below failed to consider the Petitioner's constitutional claims, permitted under the ***Real ID Act***, due to its sole consideration of legal provisions related to abuse of discretion and the agency's exercise of discretion, to the exclusion of the Petitioner's constitutional claims.

I. THE SECOND CIRCUIT DECISION ADDS TO THE UNCERTAINTY REGARDING THE JURISDICTION OF THE COURT TO ADJUDICATE CONSTITUTIONAL/LEGAL CLAIMS RAISED IN PETITIONS FOR REVIEW, PURSUANT TO THE REAL ID ACT, AMONG THE COURTS OF APPEAL, WHERE COMPETING DISCRETIONARY ISSUES RAISED IN THE APPEAL WOULD OTHERWISE BE SUBJECT TO SUMMARY AFFIRMANCE OR OTHER DISMISSAL

The ***Real ID Act***, enacted on May 11, 2005, sets the parameters of Circuit Court jurisdiction to consider alien legal claims presented through the petition for review process. In limiting habeas jurisdiction over orders of removal, the Congress retained within the jurisdiction of Courts of Appeal issues related to constitutional claims and questions of law. Challenges to agency discretion not encompassed by a constitutional challenge or a question of law are no longer within the jurisdiction of the Courts of Appeal for adjudication.

Such discretionary challenges, when presented to Courts of Appeal through a petition for review, are subject to motions for summary affirmance or motions to dismiss for lack of jurisdiction.

Due to the relatively recent enactment of the ***Real ID Act***, there appears to be no uniform manner in which Courts of Appeal are to evaluate the treatment of appeals containing both challenges to adverse discretionary determinations by the agency as well as underlying constitutional/legal challenges to the manner in which the removal proceedings were conducted.

> A. The Executive Office For Immigration Review has been granted the authority to render decisions on relief applications in the exercise of its discretion. It, nonetheless, is obligated to provide the alien due process of law in the conduct of its administrative legal proceedings.

An alien's applications for adjustment of status and voluntary departure are adjudicated in the exercise of discretion by the Executive Office For Immigration Review. Under the law prior to May 11, 2005, the agency's discretionary determinations were not subject to federal review, absent a constitutional claim. [See, *Immigration and Nationality Act, Section 242(a)(2)(B)(ii).*] The law stated: "Notwithstanding any other provision of law, no court shall have jurisdiction to review...any other decision or action of the Attorney General the authority... which is...in the discretion of the Attorney General." Constitutional due process claims have not, however,

been deemed to be incorporated within areas reserved to the agency's sole discretion. [See, *Bernal -Vallejo v. INS*, 195 F.3d 56 (1st Cir. 1999)]

This court has found that aliens in removal proceedings are entitled to due process of law and a fundamentally fair hearing. In recognizing that right, this court stated: "It is well established that the fifth amendment entitles aliens to due process of law in deportation proceedings." *Reno v. Flores*, 507 US 292, 306 (1993) By its own decisions, the Board has determined that a fundamentally fair hearing in deportation proceedings requires that the immigration judge make the required findings and whether the appropriate factors and weight were applied in the case. *Matter of Tijam*, Int. Dec. #3372 (BIA 1998) Further, the Second Circuit Court Of Appeal has recognized that even where a Board decision is unpublished, and thus not- binding in other cases, the decision is, in fact, binding in the case at issue. *Douglas v. INS*, 28 F.3d 241, 245 (2nd Cir. 1994) Moreover, the Board may summarily affirm a decision of an immigration judge only if the decision of the immigration judge contains sufficient reasoning sufficient to permit review by a federal court. *Chen v. INS*, 87 F.3d 5 (1st Cir. 1996)

The provisions of the ***Real ID Act*** do not alter these longstanding principles regarding the Board's adjudicatory authority.

B. This petition presents a question of considerable importance regarding the application

of the ***Real ID Act*** by Courts Of Appeal on consideration of petitions for review, and asks whether an appeal brought under the ***Real ID Act*** may be disposed of by summary affirmance where the Respondent has entered contradictory and conflicting decisions regarding issues relevant to the Petitioner's appeal, the decision favorable to the Petitioner being entered with a full opinion and with specific instructions to the immigration judge on how to properly review Petitioner's claims on remand, those instructions having been ignored by the immigration judge on remand and decision adverse to the Petitioner being entered without opinion regarding the underlying issues or the failure of the immigration judge to adjudicate the proceedings in the manner previously required by the Board?

During the course of the Petitioner's deportation proceedings, the Board found numerous due process problems with the adjudication of the case. The Petitioner was ordered removed in absentia by the immigration judge. That decision was deemed to be faulty and was vacated. The Petitioner's deportation proceedings were reinstated. Upon remand, the decision of the immigration judge to deny Petitioner's application for adjustment of status was also found to be flawed and the proceedings were remanded with specific findings regarding the Petitioner's alleged untruthful testimony, his alleged misrepresentations regarding his criminal history and arrest record in the United States, as well

as specific findings from the Board that the Petitioner's 18 year residence was to be deemed to be a positive factor in support of his request for relief, the Petitioner's extensive family ties, including his US citizen wife, mother, brother, US resident father and his US citizen biological child and step child. The immigration judge, on remand, largely ignored the specific findings of the Board regarding these positive factors and blatantly disregarded the findings of the Board regarding the relative seriousness of the Petitioner's convictions for a seat belt violation and disorderly conduct. The Board deemed these offenses to be minor, yet the immigration judge deemed them to be significantly negative factors.

Similarly, the Board stated that the Petitioner's misstatements regarding his criminal history did not warrant negative consideration, yet the immigration judge ignored that dictate and used the mis-statements to justify his determination that the Petitioner's testimony lacked credibility. This was the finding of the immigration judge even though the mis-statements were due, in part, to errors of the Petitioner's attorney in preparing the adjustment application.

Additionally, though the Board asserted that the Petitioner's family ties were to be given more positive consideration by the immigration judge in the remanded proceedings, the immigration judge merely noted the family ties in passing, assessed the hardship to the Petitioner's family upon Petitioner's deportation to Nigeria solely in terms of financial hardship.

ignoring entirely, the emotional/psychological hardship to be borne by the family upon the Petitioner's deportation. Inexcusably, the immigration judge completely ignored the hardship of the Petitioner's deportation upon his US citizen biological child. The Petitioner's biological child is no where mentioned in the decision of the immigration judge.

The Board, having full knowledge of its prior findings regarding the proper weighing of the positive and negative equities in the adjudication of the Petitioner's adjustment application, had reason to know, from reading the decision of the immigration judge, that its prior findings regarding the importance of the relevant factors had been ignored and that a proper analysis of the Petitioner's equities and negative factors had not been conducted, issued a decision concurring with the outcome of the case as decided by the immigration judge. The 2003 decision of the Board regarding the proper adjudication of the positive equities and negative factors was the law of the case and the immigration judge was not permitted thereafter to make contrary findings regarding those issues. The decision of the immigration judge to ignore the findings of the Board as presented in the 2003 decision deprived the Petitioner of a fundamentally fair hearing. The 2003 decision was binding on the immigration judge in all proceedings conducted there after. Thus, the Board erred in permitting the immigration judge to disregard its prior findings.

The fact that the Board's 2005 decision asserted agreement with the outcome without specifying

agreement with the analysis of the immigration judge did not cure the due process violation. Inasmuch as the immigration judge would not have been able to balance the positive equities and the negative factors against the Petitioner without disregarding the findings of the Board in its 2003 decision, the conclusions reached by the immigration judge were inherently flawed.

Accordingly, the Second Circuit Court of Appeal erred in limiting its consideration of the Petitioner's appeal solely to the questions of whether the Board properly exercised its discretion and whether the Board abused its discretion. The Board's legal findings regarding the proper weight to give to the Petitioner's positive equities and the negative factors present in his case were not discretionary in nature. The Court of Appeals was without justification in summarily affirming the decision of the Board because the Board's 2005 decision ignored its 2003 decision which provided specific directions to the immigration judge regarding the adjudication of the Petitioner's relief application. Given the conflict in the Board's two decisions, the Court of Appeal was to render a decision on the merits of the Petitioner's appeal or, if the record was not sufficient to permit adjudication on the merits, the Court of Appeal was obligated to remand the matter to the Board for clarification as to the Board's 2003 decision could be reconciled with the 2005 decision. Given the conflict in the decisions entered by the Board, summary affirmance was not the appropriate manner in which to resolve the Petitioner's petition for review.

While the Second Circuit's summary affirmance might have been appropriate if only discretionary issues were before the court, the Respondent did not have the discretion to issue conflicting and contradictory decisions in the same case and its manner of adjudicating the Petitioner's appeal was a violation of the Petitioner's right to due process warranting full adjudication on the merits by the Second Circuit Court of Appeal.

Conclusion

WHEREFORE, for all the aforementioned reasons, Petitioner respectfully asks that his petition for writ of certiorari be GRANTED.

Sincerely,

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York, Pennsylvania 17402
(717) 755- 8188
(717) 843-0417 fax
Attorney For Petitioner,
Benjamin Obianwu

United States Court Of Appeals
For The
SECOND CIRCUIT

BIA
A29-722-599

At a stated Term of The United States Court Of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 11th day of September, two thousand and six,

Present:
Hon. Guido Calabresi,
Hon. Rosemary S. Pooler,
Hon. Barrington D. Parker,
Circuit Judges

Benjamin Obianwu,
Petitioner,
v. 05-6774- AG
Alberto Gonzales,
Respondent.

The government moves to dismiss Benjamin Obianwu's petition for review of the order of the Board of Immigration Appeals ("BIA"), denying his motion to

reconsider the denial of his application for adjustment of status and voluntary departure. Upon due consideration, it is ORDERED that the government's motion is construed as a motion for summary affirmance and , as so construed, is GRANTED since the BIA's determination correctly applied applicable legal principles and involved no abuse of discretion.

FOR THE COURT:
Roseann B. MacKechnie, Clerk
By: _____

US Department Of Justice
Executive Office For Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A29-722-599 - Buffalo

Date: December 20, 2005

In Re: BENJAMIN IFEANY OBIANWU
aka Benjamin Ifeany Bianwu

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Michael B. Berger, Esquire

CHARGE:

Order: Sec. 241(a)(9),
I&N Act [8 USC 1251(a)(9)]-
Failed to comply with conditions of status

APPLICATION: Reconsideration

By decision dated September 6, 2005, the Board dismissed the respondent's appeal from the November 25, 2003, decision of the Immigration Judge, which had denied the respondent's applications for adjustment of status under section 245 of the Immigration and Nationality Act, 8 USC 1255. The Respondent has now

filed a motion for reconsideration of our September 6, 2005, decision. The motion will be denied.

"The very nature of a motion to reconsider is that the original decision was defective in some regard." *Matter of Cerna*, 20 I&N Dec. 399, 402 (BIA 1991). When reconsideration is sought of a decision of the Board, the motion should specify the errors of law or fact in the previous Board decision. In this case, the respondent has essentially reiterated arguments which were previously considered at the time of our September 6, 2005 decision. We note that a motion to reconsider is not simply, in effect, an opportunity to file a new brief on appeal raising or expanding upon arguments regarding the Immigration Judge's decision that could have previously been presented during the appeal process. We find no new legal argument presented nor any particular aspect of case that was overlooked in our previous decision. Moreover, the respondent has raised no argument in the motion to reconsider that would cause us to reverse the previous decision. Accordingly, the motion will be denied.

ORDER: The respondent's motion for reconsideration is denied.

(Hurwitz, Gerald S.)

For the Board

Appendix C A-5
US Department Of Justice
Executive Office For Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A29-722-599 - Buffalo

Date: September 6, 2005

In Re: BIANWU, BENJAMIN IFEANYI

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Michael B. Berger, Esquire
ON BEHALF OF DHS:
Joy A. Merriman, Assistant Chief Counsel

ORDER:

PER CURIAM: The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. See 8 CFR 1003.1(e)(4).

(Hurwitz, Gerald S.)

For the Board

Appendix D A-6
US Department Of Justice
Executive Office For Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A29-722-599 - Buffalo

Date: May 19, 2003

In Re: BENJAMIN IFEANY OBIANWU

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Michael B. Berger, Esquire
ON BEHALF OF SERVICE:
Denise C. Hochul,
Assistant District Counsel

CHARGE:
Order: Sec. 241(a)(9),
I&N Act [8 USC 1251(a)(9)]-
Non-immigrant- failed to comply with
conditions of status

APPLICATION: Adjustment of status

In a decision dated March 14, 2001, an Immigration Judge found the respondent deportable as charged and denied his application for adjustment of status. The respondent has appealed. The appeal will be sustained,

and the record will be remanded to the Immigration Judge.

The Immigration Judge denied the respondent's application for adjustment of status in the exercise of discretion. In Matter of Arai, 13 I&N Dec. 494 (BIA 1970), the Board held that where adverse factors are present in a given application for adjustment of status under section 245 of the Immigration and Nationality Act 8 USC 1255, it may be necessary for the applicant to offset these by a showing of unusual or even outstanding equities. Id at 496. Generally, favorable factors such as family ties, hardship, and length of residence in the United States will be considered as countervailing factors meriting favorable exercises of discretion. Id.; see also Matter of Mendez, 21 I&N Dec. 296, 300 (BIA 1996) (same). On appeal, the respondent claims that the Immigration Judge did not conduct a proper balancing of factors. We agree.

The Immigration Judge noted a number of adverse factors in the respondent's case, but failed to consider any of the respondent's equities. In particular, the Immigration Judge noted the fact that the respondent failed to disclose his criminal record or his adjustment application and answered "no" under oath when asked if he had ever been arrested, fined or convicted (Tr. At 36). However, the respondent did admit to the arrests when confronted. Moreover, the respondent's criminal record is relatively minor. Although he was arrested on numerous occasions, the Immigration and Naturalization Service ("the Service", now the Department of

Homeland Security, DHS) was unable to produce any conviction records, even after being given a continuance to do so. At most, it appears that the respondent was convicted for driving under the influence in 1989 (Tr. 88-89), which may have been reduced to a seatbelt violation (Tr. 121). He was also convicted in 1999 on three counts of disorderly conduct for which he paid a fine (Tr. At 93-94). The Immigration Judge also concluded that the respondent's marriage is presumed fraudulent because the marriage occurred while the respondent was in proceedings. However, at the time of the hearing, the respondent's wife was pregnant with their child, which is an indicator that the marriage is bona fide. *See* 8 CFR 204.2(a)(1)(iii)(B)(4) and 245.1(c)(9)(v)(D).

These factors should have been balanced against the respondent's equities. The record reflects that the respondent is married to a United States citizen, has a United States citizen stepchild who resides with him and has a United States citizen child of his own with his new wife. He has been living in the United States for more than 18 years. Moreover, his United States citizen mother and brother and lawful permanent resident father also reside in the United States. Accordingly, the record will be remanded to the Immigration Judge for a proper balancing of factors. The respondent's request that a different Immigration Judge be assigned to the case on remand is denied, as we find no evidence of bias against the respondent.

ORDER: The respondent's appeal is sustained.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

(Roger A. Pauley)

FOR THE BOARD